

APPEAL NO. 010144

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on November 30, 2000. At the CCH, the parties requested that four docket numbers, involving four injuries, multiple issues, and three carriers be heard at the same time in one CCH. All the parties were represented by capable highly competent attorneys. The hearing officer's decision was only challenged in this case and, therefore, the hearing officer's decision in the other cases has become final pursuant to Section 410.169. The issues agreed upon in this case were:

1. Can the Carrier [appellant/cross-respondent] take credit against temporary income benefits (TIBs) it would otherwise owe to the Claimant [respondent/cross-appellant] for short-term disability [STD] payments the employer made to the Claimant?
2. As a result of the decision and order of the Benefit Contested Case Hearing (and affirmation by Appeals Panel in Appeal No. 000300 [Texas Workers' Compensation Commission Appeal No. 000300, decided March 23, 2000], does the Commission [Texas Workers' Compensation Commission] have jurisdiction to determine compensability of arthritis and damage to joint surfaces of the right knee?
3. Did the Claimant sustain disability from January 13, 2000 to the present?
4. Is the compensable injury of _____ a producing cause of arthritis and damage to joint surfaces of the right knee?

With regard to those issues, the hearing officer determined that (carrier) can take dollar for dollar credit against TIBs it would otherwise owe to the claimant for the STD payments made by the employer "to Claimant after _____, to the extent such disability payments were funded by Employer"; that the Commission has jurisdiction to determine extent of injury of arthritis and joint damage because those issues were not litigated in Appeal No. 000300; that the claimant had disability from January 13, 2000, through the date of the CCH; and that the compensable (right knee strain) injury of _____, is a producing cause of arthritis and damage to the joint surfaces of the right knee.

The carrier appeals the determinations on the jurisdiction, disability, and extent of injury issues. The claimant appeals the set-off for STD issue and responds to the carrier's appeal.

DECISION

Affirmed in part as reformed, and reversed and rendered in part.

It is undisputed that the claimant initially sustained a right knee injury in 1993; that the claimant had arthroscopic surgery in April 1994 (reached maximum medical improvement (MMI) with an impairment rating in 1994) and continued to have pain and grinding in her knee in 1995 and 1996; that the claimant had a second knee surgery in November 1996, had another compensable right knee injury in 1997, had a third surgery in October 1997, and a fourth surgery for the removal of a screw in the latter part of 1997. The claimant had another alleged knee injury in 1998 (denied by the carrier) and sustained another knee injury on _____.

The 1999 injury was the subject of Appeal No. 000300, *supra*, where the Appeals Panel affirmed the determinations of another hearing officer (or unappealed issues became final) that the compensable 1993 injury was a producing cause "of the chondral defect of the right medial femoral condyle," that the claimant "sustained a compensable injury . . . in the form of a right knee sprain on or about _____," and that the claimant had disability beginning April 12, 1999, "and continuing through the date of this hearing [January 12, 2000]." The parties stipulated that the "Appeals Court [sic Panel] Decision 000300 has been appealed to the District Court in County"

Background information and some medical evidence is recited in Appeal No. 000300 and will not be repeated here. On the STD issue, the evidence was that the employer paid for a STD policy which pays 50% of the wage to any employee that is unable to work, regardless of the cause, as an employee benefit. The employee can elect to pay a small premium and increase the STD plan by 16 2/3% so that the employee would receive 2/3 of the employee's wage. The carrier is only claiming an off-set for the 50% paid for entirely by the employer. The claimant argues that she should get the 50% of her wage under the STD plan plus the 70% of her wage as TIBs (*i.e.* a total of 120% of her wage). The carrier argues that the claimant's argument would allow "double dipping." The parties argued over whether the STD is taxable and what the Legislature intended in Section 408.003 (salary continuation). The hearing officer, in allowing the carrier to take credit for the STD payments against TIBs, cites a provision of the STD plan which provides that "disability benefits are reduced by the amount of other income [the claimant] receive[s] . . . such as . . . Workers' Compensation . . . benefits." The hearing officer finds that to hold as the claimant contends would allow the claimant to "double dip" and receive benefits which "equal 120% of Claimant's previous wage." *Tex. W.C. Comm'n*, 28 TEX. ADMIN. CODE § 129.2(c) and (d) (Rule 129.2(c) and (d)) specifically provide that Post-Injury Earnings shall include any monies paid to the employee as salary continuation pursuant to an employer policy or agreement and does not include any monies paid to an employee under an indemnity disability program paid for by the employee separate from workers' compensation. STD payments prior to the effective date of Rule 129.2 would be considered collateral income and not subject to set-off. Rule 129.2 had an effective date of December 26, 1999, and we therefore reform the hearing officer's decision on this issue to state that the carrier may take credit for STD payments made to the claimant after December 26, 1999 (rather than _____), to the extent such disability payments were funded by the employer. We affirm the hearing officer's determinations on this issue, as reformed, as not being contrary to law.

As noted in Appeal No. 000300, the hearing officer found that the chondral defect was due to the 1993 injury; that the claimant sustained a compensable knee strain; and that the claimant had disability to January 12, 2000. This hearing officer found that "compensability of arthritis and damage to joint surfaces of the right knee . . . were not litigated in . . . Appeal No. 000300." Although the carrier argues that the chondral defect is just another way of saying that the claimant has degenerative joint disease, we affirm the hearing officer's findings on this issue as being technically correct subject to our holding on the extent-of-injury issue.

On the disability issue, disability is defined as the inability to obtain and retain employment at the preinjury wage due to the compensable injury. Section 401.011(26). The hearing officer in Appeal No. 000300 found that the claimant had disability from April 12, 1999, to January 12, 2000, with the ending date of disability being the date of the CCH. There is no evidence that the claimant was able to obtain and retain employment the next day and all the medical evidence as well as the claimant's testimony establishes that the claimant continues to be off work due to her knee injury, the most recent manifestation of which was the compensable knee strain of _____. Consequently, we affirm the hearing officer's decision continuing disability from January 13, 2000, to the date of the CCH in this case, November 30, 2000.

This hearing officer found that the compensable (knee sprain as found in Appeal No. 000300) injury was a producing cause of arthritis and damage to joint surfaces of the right knee, citing reports from Dr. S and Dr. A. After the January 2000 CCH, the claimant changed treating doctors to Dr. S. In a report dated April 17, 2000, Dr. S states that the claimant "has an end stage arthritis of her knee." Dr. S went on to comment:

Any twisting injury of the knee would not be simply a strain or a sprain of the soft tissues but rather a grinding of two uneven joint surfaces which are markedly abnormal as proven by multiple arthroscopies in the past. In this regard, no, she never really suffered only a knee strain or sprain, and all of her recent twisting injuries are the result of the fact that she has a markedly arthritic joint

Dr. S went on to conclude that he does "not think [the claimant] suffered a minor knee sprain" in the _____, incident. We do not read Dr. S's report as saying the compensable knee sprain of _____, was a producing cause of the "arthritis and damage to joint surfaces of the right knee" but rather Dr. S seems to be arguing that the claimant sustained more than a knee sprain, an issue which was resolved in Appeal No. 000300, *supra*, at least as far as this case is concerned. Dr. A, in a report of May 30, 2000, talks about aggravation and concludes that "the twisting type injury that [the claimant] describes in _____ could definitely exacerbate an underlying problem of moderately severe degenerative arthritis." Dr. A, in essence, says that the _____ twisting injury aggravated the claimant's arthritis which might be a new injury in its own right but which the hearing officer in Appeal No. 000300 found only resulted in a knee sprain. Further, the carrier points out that degenerative changes were diagnosed as early as 1995,

and arthritis was diagnosed in a report by the claimant's then treating doctor in a report of April 8, 1998. Consequently, it is hard for us to visualize that a compensable knee sprain injury of _____ could have been a producing cause of conditions diagnosed years earlier in 1995 and 1998. While the parties talked about aggravation, the fact is that the attorneys for both sides agreed to the issue as recited, not an issue of whether the _____ compensable injury aggravated a preexisting condition, a matter which seems to have been resolved by the hearing officer in Appeal No. 000300, limiting that injury to a knee sprain. The parties were represented by knowledgeable attorneys and presumably were aware of how the issue was framed.

There was testimony and evidence that the claimant may need yet another knee surgery and/or a total knee replacement. The carrier, at the CCH, represented that it had offered such additional medical benefits but wished to relate that surgery/treatment to the 1997 compensable injury. The claimant declined the surgery, saying that the carrier was seeking to avoid the payment of additional TIBs by relating the surgery to the 1997 injury. We observe that in affirming disability through November 30, 2000, the claimant appears to be only a few months from statutory MMI (Section 401.011(30)(B)) when TIBs would stop in any event. See Section 408.101.

We affirm the hearing officer's decision and order on the issues of credit for STD payments for the carrier, as reformed, that the Commission has jurisdiction over the extent-of-injury issue and disability. We reverse the hearing officer's determinations that the claimant's compensable _____, injury was a producing cause of arthritis and damage to joint surfaces of the right knee (which had previously been diagnosed) and render a new decision that the compensable _____, injury was not a producing cause of conditions previously diagnosed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge